(3)

No. 04-516

Supreme Court, U.S.
FILED
DEC 21 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Leshia Donaldson, et al.,

Petitioners,

v.

Leon Lott, Richland County Sheriff, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Pamela S. Karlan
(Counsel of Record)
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Francis T. Draine
Suite 303
2231 Devine St.
P.O. Box 5895
Columbia, SC 29250

December 21, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONERS 1
I. Certiorari is Warranted to Resolve the Circuit Conflict over Whether *Ybarra* Clearly Established the Unconstitutionality of "All Persons" Searches in the Absence of Individualized Probable Cause. 1
II. Certiorari is Warranted to Decide the Relevance of Out-of-Circuit Authority in the Qualified Immunity Determination. 5
III. Respondents' Arguments That This Case Is Not an Appropriate Vehicle to Decide the Questions Presented Lack Merit. 8
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Brosseau v. *Haugen*, 543 U.S. ___ (2004) (No. 03-1261) 5, 7
Doe v. *Groody*, 361 F.3d 232 (CA3 2004), *cert. denied*, 125 S. Ct. 111 (2004) 3
Groh v. *Ramirez*, 124 S. Ct. 1284 (2004) 4
Jean v. *Collins*, 155 F.3d 701 (CA4 1998) (en banc), *vacated and remanded on other grounds*, 526 U.S. 1142 (1999) 6
Malley v. *Briggs*, 475 U.S. 335 (1986) 4, 10
Marks v. *Clarke*, 102 F.3d 1012 (CA9 1996), *cert. denied*, 522 U.S. 907 (1997) 3
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984) 5
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 9
Saucier v. *Katz*, 533 U.S. 194 (2001) 7, 8, 9
State v. *Guy*, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993) 10
United States v. *Leon*, 468 U.S. 897 (1984) 5
Williams v. *Kaufman County*, 352 F.3d 994 (CA5 2003) 3
Wilson v. *Kittoe*, 337 F.3d 392 (CA4 2003) 6
Wilson v. *Layne*, 526 U.S. 603 (1999) 5, 6
Ybarra v. *Illinois*, 444 U.S. 85 (1979) ..... passim

Statutes

42 U.S.C. 1983 ..... 4, 8

REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari demonstrated that this case presents two important and recurring questions on which the lower courts are split. First, did this Court's decision in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), clearly establish the unconstitutionality of "all persons" searches in the absence of probable cause to search each individual? The Third, Fifth, and Ninth Circuits have held that it did. The Fourth Circuit in this case held that it did not. See Pet. 9-17. Second, how should out-of-circuit precedent be used in determining whether government officials are entitled to qualified immunity? Two circuits have held that it should not be used at all. Six other circuits have taken a results-oriented approach, asking whether out-of-circuit authority clearly establishes the unconstitutionality of particular conduct. The Fourth Circuit in this case has taken yet a third approach, looking to whether there is a uniform verbal formulation of the legal rule rather than to whether there would be consensus among the cases on the constitutionality of respondents' conduct. See *id.* 22-29. The large number of decisions in which the courts have been called on to decide the constitutionality of "all persons" warrants demonstrates that this Court's guidance is required. See *id.* 18-22. Respondents' arguments for nonetheless denying certiorari lack merit.

I. Certiorari is Warranted to Resolve the Circuit Conflict over Whether *Ybarra* Clearly Established the Unconstitutionality of "All Persons" Searches in the Absence of Individualized Probable Cause.

A. In *Ybarra*, this Court expressly held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person" and that the requirement to show probable cause "cannot be undercut or avoided simply by pointing to the fact that coincidentally there exists probable

cause * * * to search the premises where the person may happen to be." 444 U.S. at 91. Both before and since *Ybarra*, there has been virtual unanimity among the lower courts that "all persons" searches like the one conducted in this case violate the Fourth Amendment. See Pet. 9-13 (describing the decisions of the Third, Fifth, and Ninth Circuits); *id.* 18-21 (citing decisions as early as the 1970s by state supreme and intermediate appellate courts). In this case, the Fourth Circuit embraced the consensus view and held that respondents' conduct violated the Fourth Amendment.[1] The "only justification" respondents gave the magistrate for issuing an "all persons" warrant was the assertion "that subjects present at the scene of [an] illegal drug distribution * * * commonly have drugs in their possession." Pet. App. 12a (brackets and ellipses in original). Respondents thus relied entirely on the "propinquity" presumption decisively rejected in *Ybarra*. Indeed, respondents' own argument perfectly illustrates this point, as they maintain that the warrant was valid because the "illegal drug activity witnessed by the informant" had occurred "on the same day" and "[t]he premises was a small, private residence." BIO 8.

Respondents seek to avoid the force of *Ybarra* by noting that *Ybarra* reserved judgment on the constitutionality of a warrant that "authorizes the search of unnamed persons in a place *and is supported by probable cause* to believe that *persons* who will be in the place at the time of the search *will be in possession of illegal drugs*." BIO 4 (quoting *Ybarra*, 444 U.S. at 92 n.4 (emphases added)). This argument fails for the reason set forth in the petition, which respondents simply ignore: the scenario hypothesized in the *Ybarra* footnote differs materially from the recurring factual scenario

---

[1] To be sure, both the district court and the court of appeals analyzed the question by taking the facts in the light most favorable to petitioners. Cf. BIO 1-2. But as this Court has repeatedly stated, that is the appropriate method in assessing claims of qualified immunity. See *infra* at 9.

exemplified by this case. Here, the "all persons" warrant was *not* supported by probable cause with respect to each petitioner. Respondents' contention that mere propinquity is sufficient to establish probable cause simply guts *Ybarra*'s actual holding. See Pet. 14-17.

B. Although it is plain that respondents' conduct violated the Fourth Amendment,[2] there is a square conflict over whether respondents are nonetheless entitled to qualified immunity. The Ninth Circuit in *Marks* v. *Clarke*, 102 F.3d 1012 (CA9 1996), *cert. denied*, 522 U.S. 907 (1997), held, on indistinguishable facts, that defendant-officers were not entitled to qualified immunity. See Pet. 9-11. Respondents attempt to answer the stark conflict with *Marks* in only a single sentence: without citation to the opinion, respondents assert that *Marks* merely "read[] the *Ybarra* decision as setting forth a clearly established rule that a search warrant must be supported by probable cause," BIO 3, a basic proposition on which respondents point out "[t]here is no disagreement," *ibid.* But *Marks* of course did much more: as the petition detailed (at 10-11) and respondents again ignore, the Ninth Circuit specifically held that *Ybarra* so clearly established that, absent individualized probable cause, an "all persons" warrant violates the Fourth Amendment that officers who execute one are not entitled to qualified immunity.

The Third and Fifth Circuits have also denied qualified immunity on materially similar facts. See *Doe* v. *Groody*, 361 F.3d 232 (CA3 2004), *cert. denied*, 125 S. Ct. 111 (2004); *Williams* v. *Kaufman County*, 352 F.3d 994 (CA5

---

[2] As the petition explained, this consensus on the outcome of the Fourth Amendment inquiry is one of the factors that makes this case an especially appropriate vehicle for resolving the questions related to qualified immunity. See Pet. 27. Nor is it particularly "ironic" that petitioners identify a conflict between the Fourth Circuit and other courts of appeals and simultaneously maintain that the law was "clearly established" by *Ybarra*. Contra BIO 4. The Fourth Circuit simply misread *Ybarra*. See Pet. 16-17.

2003); Pet. 11-14. Respondents rely on the fact that in *Doe* and *Williams* – in contrast to this case and *Marks* – the search was not conducted pursuant to an "all persons" warrant. The petition (at 14) again fully anticipated this argument. The presence or absence of a warrant is immaterial to the qualified immunity determination in a case, such as this, in which the defendant-officers secure the defective warrant. At least since *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986), it has been clear that an officer cannot obtain qualified immunity if he causes a Fourth Amendment violation by presenting a magistrate with a warrant application that "a reasonably well-trained officer would have known * * * failed to establish probable cause."

Thus, if *Ybarra* clearly established that propinquity alone cannot provide probable cause – as petitioners contend and the Third, Fifth, and Ninth Circuits hold – then a reasonably well-trained officer in respondent Maldonado's position should have known that his asserted basis for an "all persons" warrant would be constitutionally insufficient. Whether he sought a warrant or not, he is liable in a Section 1983 damages action for causing a clearly unreasonable and unconstitutional search. As this Court explained last Term in *Groh* v. *Ramirez*, 124 S. Ct. 1284, 1293 (2004), when it denied qualified immunity to an officer who executed a search warrant that violated the Fourth Amendment's particularity requirement, "[i]t is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized"; "because [the officer] himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid."[3]

---

[3] In a slight variation on this argument, respondents contend that "[t]he fact that the warrant was issued compels the conclusion that the law was not clearly established at that time and that the Respondents could not have reasonably known that their conduct in

II. Certiorari is Warranted to Decide the Relevance of Out-of-Circuit Authority in the Qualified Immunity Determination.

Review is furthermore warranted because the decision below exacerbates a substantial conflict over the relevance of out-of-circuit authority to the qualified immunity inquiry. Respondents offer no answer to petitioners' showing that there is a clear conflict among the circuits and that under the qualified immunity methodology employed by six other circuits the outcome in this case would have been different. See Pet. 23-26. In contrast to either *Wilson* v. *Layne*, 526 U.S. 603 (1999), or this Court's recent decision in *Brosseau* v. *Haugen*, 543 U.S. ___ (2004) (No. 03-1261), slip op. at 6, in which the plaintiffs could point to "only a handful of cases," petitioners have cited literally *dozens* of cases, including cases from three courts of appeals and at least twelve state supreme courts, that have established the unconstitutionality of "all persons" searches conducted without individualized probable cause. If out-of-circuit precedent can ever play a decisive role in determining whether the unconstitutionality of an official's act is clearly established, it must do so here. Thus, this case offers a particularly appropriate opportunity for this Court to clarify this key aspect of the qualified immunity inquiry.

---

executing the warrant was unlawful." BIO 8. But a warrant cannot create probable cause where none exists: as the Fourth Amendment itself provides, "no Warrants shall issue, but upon probable cause." Cf. *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984) ("[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."). While the existence of a warrant may change the availability of particular *remedies* – for example, evidence obtained in reasonable reliance on a defective warrant can be admitted at a criminal trial, see *United States* v. *Leon*, 468 U.S. 897 (1984) – it does not obviate the unconstitutionality of the underlying conduct.

Respondents' reliance on this Court's decision in *Wilson* to supposedly disprove the conflict, see BIO 6-7, is befuddling. This Court's opinion looked not only at decisions from the Fourth Circuit and the Maryland Supreme Court (the underlying search having taken place in Maryland), but also at out-of-circuit decisions. See *Wilson*, 526 U.S. at 616. And the Court's ultimate conclusion – that the plaintiffs had not "brought to our attention any cases of controlling authority in their jurisdiction * * *, *nor have they identified a consensus of cases of persuasive authority* such that a reasonable officer could not have believed that his actions were lawful," *id.* at 617 (emphasis added) – recognized that even in the absence of intra-jurisdictional authority, out-of-jurisdiction precedent could clearly establish the law.

Inexplicably, respondents equate this Court's analysis in *Wilson* with the rule expressed by the Fourth Circuit's prior opinion in *Wilson* (which respondents describe as "the same approach taken by the Fourth Circuit in the present case," BIO 7) that out-of-circuit is *not* relevant: "The law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wilson* v. *Layne*, 141 F.3d 111, 114 (CA4 1998), *quoted in* BIO 7. Since this Court's decision in *Wilson* v. *Layne*, the Fourth Circuit has reiterated its rule that in "determining whether a right was clearly established at the time of the claimed violation, courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *Wilson* v. *Kittoe*, 337 F.3d 392, 402-03 (CA4 2003) (internal quotation marks and citations omitted; bracketed material in the original).[4]

---

[4] In *Jean* v. *Collins*, 155 F.3d 701, 709 (CA4 1998) (en banc), *vacated and remanded on other grounds*, 526 U.S. 1142 (1999), the Fourth Circuit aligned its presumption with "the Eleventh Circuit's longstanding practice" that "if a right is

Indeed, in their opposition, respondents continue to place heavy reliance on the absence of on-point authority from "the Fourth Circuit [and] the South Carolina appellate courts" which they describe as "the courts providing controlling authority for South Carolina." BIO 7. That approach to qualified immunity may comport with the settled view of the Eleventh Circuit, but it cannot be reconciled with this Court's decision in *Wilson* v. *Layne* or the rulings of six other circuits that do look beyond their own boundaries. See Pet. 24-26.

To be sure, the Fourth Circuit in this case paid lip service to decisions from outside the circuit. See Pet. App. 18a. But it essentially ignored the consensus position that respondents' conduct violated the Fourth Amendment and gave unwarranted weight to the *one* decision (out of more than two dozen) that would not have held respondents' conduct unconstitutional. The court of appeals granted respondents qualified immunity on the grounds that the courts which had adopted the "majority view," *id.* 11a, had articulated their views using different *verbal formulations*, see *id.* 18a, even though all those courts would have reached the same *outcome* on these facts. The petition showed that the court of appeals' rule cannot be reconciled with other circuits' holding that the relevant question is whether a consensus of out-of-circuit authority would deem the defendants' conduct unconstitutional. Pet. 25-26. As this Court recently "emphasize[d]," the qualified immunity "inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition. * * * 'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that *his conduct* was unlawful in the situation he confronted." *Brosseau*, slip op. at 5 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)) (emphasis added).

---

recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense."

Respondents accuse petitioners of "fail[ing] to recognize that the different legal tests * * * can and do affect the ultimate outcome." BIO 7. They maintain that, "where as here the proper legal test effects [sic] the outcome, it was entirely appropriate for the court to focus on the fact that the legal test to be applied is not clearly established in determining that qualified immunity is appropriate." *Ibid.* Respondents' argument is a non-sequitur: although there might be some hypothetical case in which other courts' judgments of constitutionality might differ, respondents do not contest that in *this* case, the outcome would be the same regardless of which formulation a court used to describe its Fourth Amendment analysis.

The Fourth Circuit's standard also merits review because it will undermine this Court's central goal of encouraging "the law's elaboration from case to case," *Saucier*, 533 U.S. at 201, by deterring plaintiffs from filing Section 1983 damages suits in the Fourth Circuit even when the law is clearly established elsewhere because they will inevitably be dismissed due to qualified immunity. See Pet. 28.

III. Respondents' Arguments That This Case Is Not an Appropriate Vehicle to Decide the Questions Presented Lack Merit.

Respondents offer a barrage of suggestions as to why this case is not an appropriate vehicle for deciding the questions presented. Each of their suggestions reflects a profound misunderstanding of the framework for deciding questions of qualified immunity.

First, respondents claim that "[t]he legality of the warrant and whether probable cause exists * * * are issues remaining to be litigated," BIO 1, and that because the existence of probable cause "has not been conclusively determined, this case is not an appropriate avenue for this Court to resolve the perceived circuit conflicts cited by the [p]etitioners." BIO 2. This assertion is quite misleading. The court of appeals upheld respondents' assertion of qualified immunity; thus

there is nothing left to be litigated with respect to petitioners' Fourth Amendment claims. The fact that petitioners can still pursue "state law claims that were remanded by the district court to state court," *ibid.*, is simply beside the point, because their federal constitutional claims have been finally resolved by the decisions below.

Much of respondents' brief in opposition is taken up with factual assertions designed to establish that the searches in this case were in fact constitutional. See, *e.g.*, BIO 2 (suggesting there may have been additional, oral information before the issuing magistrate); *id.* at 8 (suggesting facts about the relationship between each of the persons to be searched and the premises). But whether, on respondents' version of contested facts, the search complied with the Constitution is irrelevant at this stage of the proceedings. As this Court has repeatedly stated, because qualified immunity is "an immunity from suit rather than a mere defense to liability," *Saucier*, 533 U.S. at 200 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)), and must be decided early in the course of litigation, a court facing an assertion of qualified immunity "must ask first the following question: '*Taken in the light most favorable to the party asserting the injury*, do the facts alleged show the officer's conduct violated a constitutional right?'" *Brosseau*, slip op. at 4 (quoting *Saucier*, 533 U.S. at 201). Each of the courts below held that, using that standard, petitioners had shown a constitutional violation. That was why they reached the question of qualified immunity.[5]

Respondents also offer an alternative ground for concluding that their conduct complied with the Fourth Amendment: the searches in this case were supposedly "frisk

---

[5] To be sure, if this Court were to reverse the grant of qualified immunity, it would be open to respondents on remand, in litigating the merits of petitioners' Fourth Amendment claims, to offer additional evidence to show that the search in this case was in fact constitutional.

searches in execution of the search warrant [that] were constitutionally permitted for purposes of ensuring officer safety." BIO 2. But that claim also requires accepting respondents' version of contested facts: petitioners have alleged that they were subject to intrusive evidentiary strip searches, rather than protective searches. See Pet. 4; Pet. App. 3a. Under petitioners' version of the facts, this case thus differs materially from *State* v. *Guy*, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993).

Second, respondents contend that "this [Section 1983 action] – as opposed to a criminal case – is not in the best posture" in which to engage in "further analysis of the *Ybarra* decision." BIO 5. That argument, of course, ignores the fact that no criminal case can present the important and recurring questions of qualified immunity raised by this petition. Moreover, respondents' suggestion would produce a perverse result: it would provide an exclusionary remedy to criminal defendants who have been subjected to unconstitutional searches that produced incriminating evidence while completely denying any remedy to entirely innocent individuals, such as petitioners, against whom no evidence was ever obtained. The idea that suppression motions in criminal prosecutions, rather than damages actions by entirely innocent individuals, are the preferred form of enforcing the Fourth Amendment has been rejected by this Court. See *Malley*, 475 U.S. at 334 (referring to "the person who in fact has done no wrong" as "the victim of police misconduct one would think most deserving of a remedy"). Given the overwhelming consensus in the case law that respondents' conduct violated the Fourth Amendment, petitioners should be entitled to seek redress.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Pamela S. Karlan
(Counsel of Record)
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Francis T. Draine
Suite 303
2231 Devine St.
P.O. Box 5895
Columbia, SC 29250

December 21, 2004[6]

---

[6] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Eric J. Feigin, David B. Sapp, and Sean P. Tonolli. Clinic members Michael P. Abate, Daniel S. Goldman, C. Lee Reeves, and Mara A. Silver also contributed.